***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 75-7457

*To be argued by*
HAROLD EPSTEIN

In The

## United States Court of Appeals

For The Second Circuit

JAMES MORRISSEY,

*Plaintiff-Appellant-Appellee,*

*vs.*

NATIONAL MARITIME UNION OF AMERICA,

*Defendant-Appellant-Appellee,*

and

JOSEPH CURRAN, SHANNON J. WALL and CHARLES SNOW,

*Defendants-Appellants.*

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P/S



# REPLY BRIEF FOR DEFENDANT-APPELLANT, SHANNON J. WALL

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REPLY BRIEF ON BEHALF OF APPELLANT
SHANNON J. WALL

This Reply Brief is submitted in response to certain contentions and allegations set forth in Answering Brief submitted on behalf of plaintiff-appellee, James Morrissey.

POINT I

ALL REFERENCES TO THE "SUPPLEMENTAL APPENDIX" ARE IMPROPER AND SHOULD NOT BE CONSIDERED ON THIS APPEAL.

Throughout the Answering Brief plaintiff-appellee sites his "Supplement to Joint Appendix" which he refers to as "SA",

see, e.g., pp. 8-9*. These quotations from the "Supplemental Appendix" purportedly support factual assertions made by plaintiff-appellee.

The "Supplement to Joint Appendix" consists of an affidavit of plaintiff-appellee's attorney, Arthur E. McInerney, submitted in support of said counsel's application to the trial court for counsel fees. That application is not part of the record herein nor was the denial thereof by the Court below the subject of the appeal undertaken herein by plaintiff-appellee. The Notice of Appeal served and filed by the same said counsel states that appeal is taken from so much of the lower Court's judgment:

> "[W]hich set aside the jury's verdict awarding the plaintiff punitive damages against the defendant, National Maritime Union of America, under 29 U.S.C. § 411(a)(2) and (5) (the Landrum-Griffin Act) and under the common law cause of malicious prosecution."

Any consideration of counsel's application for attorney's fees is absent even from the Court's decision below (703A-723A).

Since the question of plaintiff-appellee counsel fees is not before this Court, it is improper for plaintiff-appellee to refer to the affidavit submitted in support of such an application below.

Moreover, the bankruptcy of plaintiff-appellee's entire

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*All page references prefixed by the abbreviation "p." or "pp." are to the Answering Brief of Plaintiff-Appellee.

argument is illustrated by the tortuous citations, as supportive of alleged factual assertions made in the Answering Brief, (which are otherwise unfounded). The attorney's affidavit contains merely hearsay and rumor unsupported by anything adduced at the trial below.

Such ill-founded efforts should be frowned upon and given no cognizance on this appeal.

## POINT II

### LIABILITY MAY BE IMPOSED UPON DEFENDANT-APPELLANT WALL ONLY FOR ACTS IN WHICH HE PARTICIPATED.

a) Plaintiff-Appellee may not through innuendo hold Wall liable on the theory of guilt by association.

In broad strokes plaintiff-appellee has blended misstatements of fact with ill-applied literary allusion in an attempt at character assassination by inference. This is amply illustrated by the repeated, unfounded and unsupported contentions raised in the Answering Brief.

Despite the fact that there is not a single iota of evidence, whether direct or circumstantial, tending to prove that the defendants acted in concert in any manner relating to the arrest of plaintiff-appellee and his subsequent prosecution, plaintiff-appellee treats all of the defendants as one. Witness, for example, the statement that "Curran's men *** sought confir-

mation to what they understood his wishes to be." (emphasis supplied)(p. 8). Also that "In their insolence, they published a flyer *** " (emphasis supplied) (p. 29) without distinction as to those of the defendants whom plaintiff claimed were guilty of the publication."* (p. 29) Likewise "this jury *** knew it was dealing with defendants who wielded enormous power and had vast resources at their disposal" (p. 29). Who had vast resources at their disposal? Wall? Snow? No evidence was adduced to prove this

Such assertions are understandable when viewed in the light of the total absence of any evidence linking Wall to the arrest or prosecution of Morrissey and, even more importantly, of the proof of existence of any malice on the part of Wall.

b) The only proof offered below confirms Wall's non-participation in the acts complained of.

More insidious, however, than the direct attempts to place all defendants in the same boat is the attempt by plaintiff-appellee to draw inferences by innuendo where, in fact, none exist and where the only bases for plaintiff-appellee's unfounded allegations were fanciful rhetoric. Most blatant are statements such as those exemplified by the following: Plaintiff-appellee states that Wall,

"concurred in Curran's early edict - 'rather than give Mr. Morrissey space

*In point of fact the publication was published by a Rank and File Committee and not by any of the defendants (813E).

in The Pilot' (410A), he would shut it down (817E)" (p. 36).

This incredible statement is totally unsupported by the very record cited by counsel. The evidence of Curran's statement, such as it was, was expressly permitted into evidence only against Curran and possibly against the National Maritime Union ("NMU"), as the Court below attempted to protect any subsequent improper use of such evidence against other defendants. In fact, even plaintiff-appellee's counsel conceded that it was not being offered against anybody else (410A). That, however, was the totality of the testimony. There was no further evidence of any sort which would reflect at all upon defendant-appellant, Shannon J. Wall, with regard to such statements made by Curran; even as to whether he heard Curran make the statement. Yet plaintiff-appellee makes the very inference against which the Court below ruled.

Similarly, "Wall knew better than to disagree with Curran (401A)" (p. 37). The cited reference is silent as to any decision by Wall to agree or disagree with Curran. Rather, the testimony merely indicates that Wall participated as a member of the editorial board of "The Pilot" and that by himself, he made no objection to material published in "The Pilot".

The latter quotation purportedly is claimed to be supportive of plaintiff-appellee's position that Wall and Snow would do nothing to go against Curran's wishes and intents. As

evidence of this, and incredible as it may appear, plaintiff-appellee cites testimony in a prior action wherein a third party, not a party to the instant suit, nor an affiliated person, but rather a trustee of the NMU officers' Pension Plan, stated, that for him to go to Curran was a fearful process. In any event, such a citation of third-party testimony in a prior case is neither permissible, revealing nor relevant; such statements are not attributable to Wall or to any other parties to this action. What is fearful or alien to one man may be the delight of another.

Regardless of the position taken at any point by Wall, he was subject to damnation by plaintiff-appellee. In obvious recognition of the fact that Wall neither initiated nor participated either in the arrest or prosecution of Morrissey, plaintiff-appellee has asserted that silence, not action, is proof of guilt. Without any factual supportive citations, the following statement is made:

> "Wall was the No. 2 man on the Curran team. He was caught up in the villainy of Curran's deadly purpose. He saw here his opportunity to at once promote his personal advancement and gratify his diabolical malignity toward Morrissey. He, was more subtle in design than Curran. He was more silent in his resentment." (p. 37)

This without a shred of proof. Plaintiff-appellee would have this Court believe that subtlety has now been substituted for proof of conduct giving rise to liability. One indeed wonders what Wall could possibly have done at any point to suffi-

ciently shed the mantle of responsibility for the actions or inactions of his fellow union officers and employees with which plaintiff-appellee cloaks him.

Perhaps the most curious contention, among many set forth in the Answering Brief, is the assertion that Wall as the presiding officer of the national office meeting of March 9, 1966 wherein Morrissey's former criminal record was spread before the meeting failed to make mention of Morrissey's pardon.* The pardon (738E) that plaintiff-appellee claims was not spread before the meeting, was not even granted by the Board of Pardons of the State of Connecticut until April 4, 1966, almost one month after the meeting. It was thus obvious that the pardon was non-existent at the time of the meeting and yet the absence of its mention is unfurled like a red flag by plaintiff-appellee. The unending and unwarranted stacking of inferences continues.

In order to attempt to satisfy the requirements that malice would have to be shown against Wall, plaintiff-appellee furnishes as the underlying motive for the arrest of Morrissey that Curran and Wall were under a threat, through Morrissey's pending suit, of a substantial judgment (p. 28). Of necessity then, plaintiff-appellee takes the position that the commencement of a lawsuit, even though the same be unfounded, immediately furnishes to the defendants in those suits a malicious motive

*It must initially be noted that the said national office meeting minutes (737E) do not at all reflect the assertion that Wall presided at the meeting.

sufficient to satisfy the requisite malice requirements in an action for malicious prosecution. That the prior suit against Curran and Wall was unfounded is evidenced by the decision vindicating them. Morrissey v. Curran, et al, 351 F. Supp. 775 (S.D.N.Y. 1972), aff'd, 483 F.2d 480 (2d Cir. 1973), cert. den'd, 414 U.S. 1128 (1974). Such contentions are merely further evidence of the lengths to which plaintiff-appellee has gone to manufacture the missing ingredients of his suit against defendant Wall. The final attempts at inferring through circumstantial evidence that Wall evidenced malice toward Morrissey are the allegations made by plaintiff-appellee (at p. 36) that Wall was immediately advised of Morrissey's arrest and that despite Wall's uncontradicted testimony that he only learned of the same on the day following the arrest (292A), the jury was entitled to discredit the same. Defendant Wall submits that the jury was not entitled to discredit such testimony as no other testimony tending to negate or contradict the same was offered, nor was any attempt made to impeach Wall's testimony on this issue.

Furthermore, plaintiff-appellee contends that the jury was also entitled to infer that records lost by Snow by reason of numerous moves of the offices of the National Maritime Union, if they existed at all, would be damaging to both Wall and to Curran. The supportive facts regarding the same are alleged to be contained in the heretofore discredited Supplemental

Appendix" which does not properly form a part of this record. Aside therefrom, the only testimony on the subject comes from defendant Snow whose testimony was read into the record and who stated that he kept a file on almost everyone, including Morrissey, who caused incidents in the hiring hall (479A), that his files were disrupted since his illness and subsequent replacement as Chief of Security (483A) and that he made a report on Morrissey some years before and had given it to someone in the national office, but he was unable to identify that person (484A). Aside from counsel's singular statement that the reports on Morrissey were "suppressed", no evidence of suppression is found in the record. Any files kept by Snow in the ordinary course of his duties as Chief of Security would not be delivered to Wall nor is there any evidence that copies thereof were furnished to Wall. The mere fact that certain records which may have been kept by Snow were no longer available is not attributable to Wall nor may any inference of such attribution be drawn.

As a parting shot, plaintiff-appellee contends that he was "a force to be reckoned with". This despite the fact that he had never won a contested election. Also that as an "upstart" plaintiff-appellee was subjected to Wall's attempts to prevent him from communicating his ideas to the membership so that Wall

> "could appease Curran and secure his expectancy at the same time". (p. 38).

Morrissey was no more a threat to Wall's election than was any other candidate for office. If malice or other improper motives are to be inferred from the fact that one is an incumbent in union office and that dissidents chose to run against him, then serious reservations exist as to whether the possible danger inherent therein are acceptable accoutrements of union office. Morrissey had no trouble communicating his ideas to the membership. See, e.g., plaintiff's Exhibits 1, 2 and 3 representative of Morrissey's efforts to spread the word of his particular group of dissidents to the membership.

## POINT III

### THE ATTEMPT TO INTRODUCE THE IBRAHIM LETTER INTO EVIDENCE DID NOT CONSTITUTE AN IMPEACHMENT OF DEFENDANT'S WITNESS BY COLLATERAL MATTER.

In their core brief defendants have argued that the Court below erred in refusing to admit into evidence defendants' Exhibit B (833E), the letter to Curran from Morrissey's co-dissident Ralph Ibrahim. The issue surrounding the introduction of the said letter centered primarily not on whether the same was being used to impeach Ibrahim's testimony, but rather, whether the foundation laid for the introduction of the same against Morrissey was sufficient. The Court below recognized that the jury was entitled to infer that the letter in question

was typed by Morrissey's wife (551A) and, having been written by Morrissey's co-worker the essential question then remaining was whether the same could be introduced against Morrissey as proof of motive. It is that question which the Court answered in the negative which is the subject of that portion of defendants' appeal relating to the Ibrahim letter.

Defendants contend that the primary question, as recognized by the Court below, was not the issue of Ibrahim's credibility but rather the right of the jury to infer a motive to explain Morrissey's actions at the union hall, a motive well supplied by Ibrahim's letter. Such a motive, indicative as it was of an intentional orchestrated act, was sufficient to negate any possible finding of want of probable cause.

## CONCLUSION

The Answering Brief fails to raise any issue or present any evidence contradicting the contentions raised by defendant-appellant Wall that he neither initiated or participated in the acts complained of and that he cannot therefore be held liable on either of the causes of action set forth in the complaint.

Respectfully submitted,

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*Index No.*

*Affidavit of Service by Mail*

*STATE OF NEW YORK, COUNTY OF* *ss.:*

I, Velma N. Howe *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216

*That on the* 19th *day of* January *19* 76 *deponent served the annexed*

Reply Brief *upon* see attached *attorney(s) for*

see attached *in this action, at* see attached

*the address designated by said attorney(s) for that purpose by depositing* 2 *true copy* s *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

*Sworn to before me, this* 19th
*day of* January *19* 76.

Velma N. Howe
VELMA N. HOWE

ROBERT T. BRIN
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A 202 Affidavit of Personal Service of Papers

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*That on the* 19th *day of* January *19*76 *at* see attached

*deponent served the annexed* Reply Brief *upon*
see attached

*the* Attorneys *in this action by delivering* 2 *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

*Sworn to before me, this* 19th
*day of* January *19* 76

Robert T. Brin

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